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IN THE
Supreme Court of the United States

October Term, 1939

No. **270** _____

CLARA C. BOLLES,

Petitioner,

vs.

THE TOLEDO TRUST COMPANY, EXECUTOR OF THE
WILL OF GEORGE A. BOLLES, DECEASED,

Respondent.

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI**

GEORGE D. WELLES,

CHARLES F. BABBS,

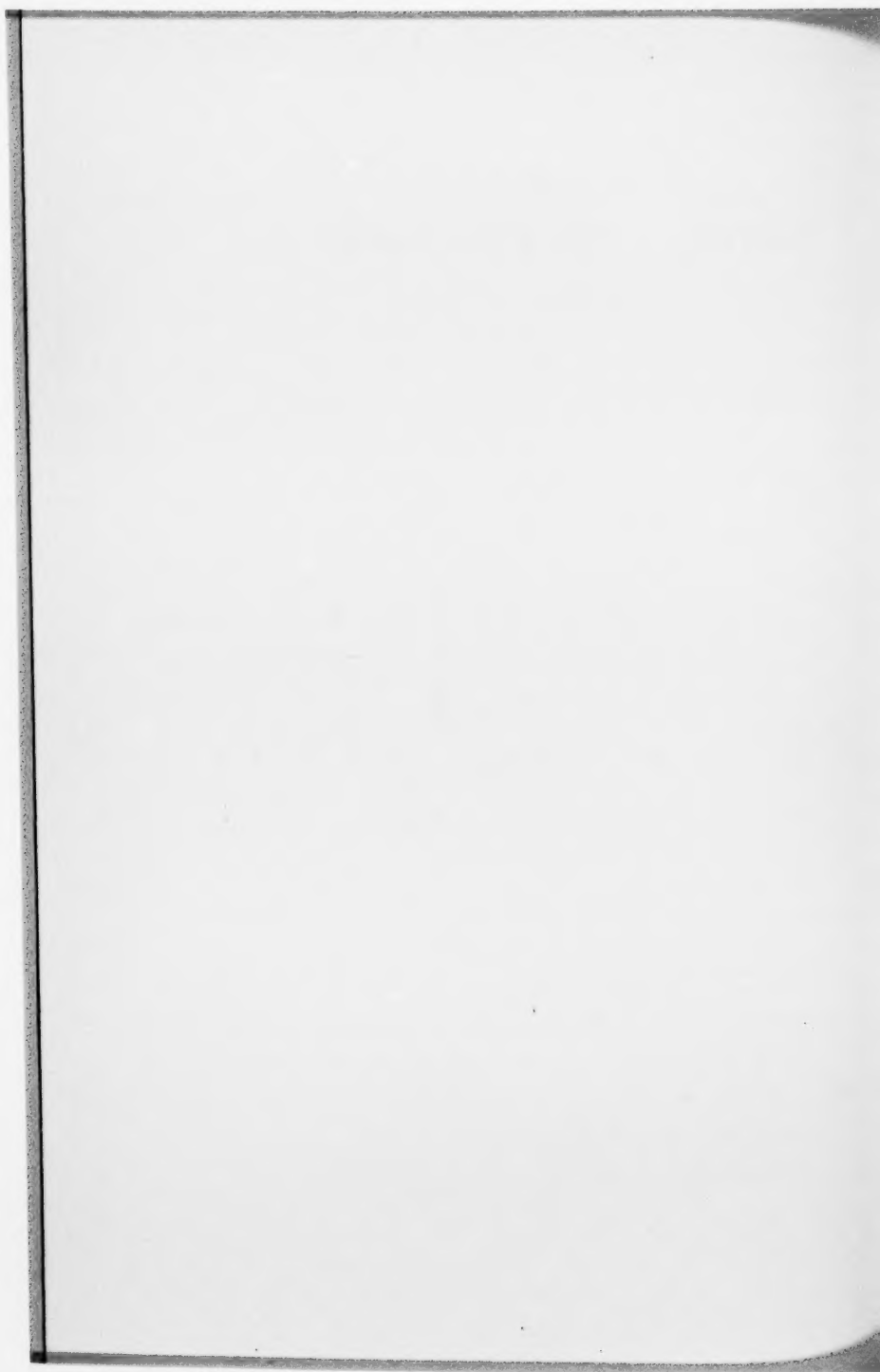
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I. OPINIONS BELOW

The opinion of the Court of Appeals (filed May 1, 1939) is at pages 481-490 of the record.

The opinion of the Supreme Court of Ohio (filed April 24, 1940, is at pages 490-495 of the record and is reported in 136 O. S. 517.

II. JURISDICTION

The jurisdiction of this court is based upon Section 344(b), U. S. C., Title 28 (R. S. Sections 690, 709; Mar. 3, 1911, c. 231, Sections 236, 237, 36 Stat. 1156; Dec. 23, 1914, c. 2, 38 Stat. 790; Sept. 6, 1913, c. 448, Section 2, 39 Stat. 726; Feb. 17, 1922, c. 54, 42 Stat. 366; Feb. 13, 1925, c. 229, Section 1, 43 Stat. 937; Jan. 31, 1928, c. 14, Section 1, 45 Stat. 54).

The decisions of this court relied upon by petitioner as supporting her claim that a question under the Fourteenth Amendment is involved herein, are

Brinkerhoff-Faris Trust & Savings Company vs. Hill, Treasurer, 281 U. S. 673;
Herndon vs. Georgia, 295 U. S. 441.

Petition for rehearing was filed on May 8, 1940, within 14 days of the decision of the Supreme Court of Ohio (April 24, 1940), as required by Rule 20 of that court, and was denied May 29, 1940 (R. 476).

III. STATEMENT OF THE CASE

Petitioner is the widow of George A. Bolles, who died in 1933. Respondent is the executor of George A. Bolles' will.

The record shows without dispute facts which the Court of Appeals held (R. 340) equitably entitled petitioner to securities of the appraised value of \$213,515.00, as the beneficiary of an express (R. 3) or constructive (R. 8) trust, resulting from the conduct and statements of her husband.

After Mr. Bolles' death, in August, 1933, petitioner permitted an officer of the respondent-executor to accompany her to a safety deposit box in which the securities now in dispute had been lodged for her benefit by her husband (R. 110) and to which he had arranged she should have separate access (R. 444, 445, 466). When she opened the box this official demanded and took possession of its contents, notwithstanding petitioner's assertion of ownership (R. 317), and the executor thereupon listed the securities in the box in its inventory as a part of the assets of the estate of the decedent Bolles (R. 75, 399, 400). The securities so taken from the box and listed stood in the name of George A. Bolles without endorsement (R. 316).

Petitioner on April 6, 1934 (R. 412), in pursuance of Section 10509-59, Ohio General Code (Appendix, page 54), filed exceptions in the Probate Court to the executor's inventory asserting that the securities were wholly owned by her as the result of a gift *inter vivos* of the legal title from her husband. The Supreme Court of Ohio reversed decisions of the Courts of Common Pleas and Appeals in favor of petitioner on her exceptions. The Supreme Court held that the case involved only the question whether a valid gift *inter vivos* of the *legal title* had been consummated and that the exceptions must be overruled on the sole ground that delivery had not been made to petitioner such as was necessary to vest her with *legal title*. *Bolles vs. Toledo Trust Company*, 132 O. S. 21, 4 N. E. 2d 917. The Supreme Court said:

"* * * there can be little doubt that he intended his wife to have the securities and thought he had effectuated such desire, * * *." (P. 30, 132 O. S.)

and

“* * * Such testimony unmistakably carries the conclusion that Mr. Bolles *considered he had made a gift* of securities he owned at certain times. But wherein does it divulge compliance with the procedure and requirements which the law says are essential to the completion of a valid gift *inter vivos?*” (Pp. 28, 29.) (Italics ours.)

Thereafter, on May 8, 1937 (R. 3), petitioner filed the present suit in equity in the Court of Common Pleas, a court of general equity jurisdiction, and alleged (a) that the legal title to the property held by the executor was subject to an express trust in her favor (*Cleveland Trust Company vs. White*, 134 O. S. 1 (1938), and *Streeper vs. Myers*, 132 O. S. 322 (1937)), and, in the alternative, (b) that a constructive trust should be impressed upon said property for her benefit (*Crooks vs. Crooks*, 34 O. S. 610 (1878), and *Hout vs. Hout*, 20 O. S. 119 (1870)). Petitioner prevailed in the Court of Common Pleas and the Court of Appeals, but lost in the Supreme Court, which court sustained respondent's claim that the proceedings on the exceptions to the inventory were *res judicata* as to petitioner's claims of express trust and constructive trust, and did not pass on the merits of either claim. (Judge Hart, who was not a member of the Supreme Court when the former case was decided, dissented.)

Thereupon petitioner filed a timely application for rehearing asserting her contention, hereinafter discussed, that the decision of the Supreme Court of Ohio retroactively changed the law of Ohio so as to deprive petitioner of any hearing and any opportunity for hearing upon the merits of her equitable claims in violation of

the rights secured by the Fourteenth Amendment to the Constitution of the United States (R. 497). The Supreme Court of Ohio denied petitioner's application for rehearing without further opinion (R. 476).

IV. SPECIFICATION OF ERRORS

The Supreme Court of Ohio erred and denied petitioner due process of law in holding,

(a) That petitioner is barred from enforcing her equitable rights in this or any other proceeding because she did not attempt to enforce them by her exceptions to the inventory in Probate Court, a court and manner *in which they were unenforcible, for lack of jurisdiction, under the decisions of the Supreme Court of Ohio, in effect at the time petitioner's exceptions to the inventory were still open for consideration.*

(b) That it was petitioner's duty to plead her equitable rights in addition to her legal rights on exceptions to the inventory and that her failure to do so barred her equitable rights, such holding being contrary to the law of Ohio, as settled by decisions of its Supreme Court in effect at the time her exceptions were heard, that a claim of legal title and a claim of equitable title or right are separate claims or causes of action, and that the decision of one such cause of action is not a bar to the other.

(c) That petitioner's equitable rights were barred by the decision in the former case, such holding being contrary to the law of Ohio, settled by decisions of the Supreme Court of that state, in effect at the time petitioner's exceptions were heard in the former case, that she might seek one remedy to enforce a supposed right,

and, failing in that (by reason of the non-existence of the supposed right) might then seek a different remedy to enforce a different right, without being barred under the principles of *res judicata* by the decision in the former proceedings.

(d) That petitioner, notwithstanding she called to the attention of the Supreme Court of Ohio by application for rehearing that its decision denied her due process of law in violation of the Fourteenth Amendment, as herein set forth, was not entitled to a rehearing and a determination of the merits of her equitable claims.

V. ARGUMENT UPON QUESTIONS PRESENTED

Summary of Argument

A summary of the argument will be found beginning on the first page of the subject index to this brief.

1. **A Decision of a State Court of Last Resort, Which Denies a Party Any Hearing and Any Opportunity for Hearing on the Merits of His Cause of Action, Is a Violation of His Rights Under the Fourteenth Amendment, and Such Decision Is, Accordingly, Subject to Review By This Court.**

The decision of this court in *Brinkerhoff-Faris Trust & Savings Company vs. Hill, Treasurer*, 281 U. S. 673, establishes this rule. There the State Supreme Court, notwithstanding its prior holdings that relief under the Fourteenth Amendment could not be granted by the State Tax Commission against a discriminating state tax, held that a suit in equity to enjoin the collection of certain

taxes must be dismissed because the taxpayer had not first sought relief from the State Tax Commission. In its opinion, by Mr. Justice Brandies, this court, after pointing out that the State Supreme Court had in its earlier cases decided that the Tax Commission did not have jurisdiction of such questions, said of the effect of the decision in the pending case,

“* * * Then it was too late for the plaintiff to avail itself of the newly found remedy. For, under that decision, the application to the Tax Commission could not be made after the tax books were delivered to the collector; * * *.” (P. 677.)

Just so, in the case at bar it was too late for petitioner to avail herself of the newly discovered jurisdiction of the Probate Court after the decision in the case at bar was handed down as the proceedings under exceptions to the inventory had long been finally terminated by the decision of the Supreme Court and the statutory period for filing exceptions had long expired (Sec. 10509-59, Ohio General Code, Appendix, page 54).

This court further said:

“* * * We are of opinion that the judgment of the Supreme Court of Missouri must be reversed, because it has denied to the plaintiff due process of law—using that term in its primary sense of an opportunity to be heard and to defend its substantive right.

* * *

“* * * The state court refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact, was never available and which is not now open to it. Thus, by denying to it the only remedy ever available for the en-

forcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property.

"*Second.* * * * The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government.

* * * while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. * * *" (Pp. 678, 679, 680, 682.)

We submit there is an exact parallel between what happened in the *Brinkerhoff-Faris Trust case* and in the case at bar. Thus, until April 24, 1940, when the opinion in the case at bar was filed, "it would have been entirely futile for the plaintiff to apply" to the Probate Court to grant on exceptions to the executor's inventory the equitable relief which she sought herein as is shown by the authorities hereinafter cited. Since April 24, 1940, the Probate Court cannot grant such relief to plaintiff because the time in which that court could act on petitioner's exceptions has long expired. Petitioner is denied a hearing herein on the merits of her equitable rights because she "did not first seek" a judicial remedy in Probate Court "which, in fact, was never available and which is not now open to" her. Therefore, at no time did the state provide to petitioner a remedy by which her equitable rights and title could be enforced as against the

respondent-executor. If the present judgment is permitted to stand, plaintiff will have been deprived of her equitable rights without ever having had an opportunity to have them finally adjudicated, and the adjudication thereof by the Court of Appeals in her favor is nullified.

This court again recognized its right to review the judgment of a state court denying due process of law in this way in the case of *Herndon vs. Georgia*, 295 U. S. 441 (1935).

2. **The Decision of the Supreme Court of Ohio Has Denied Petitioner Any Hearing and Any Opportunity for a Hearing on the Merits of Her Equitable Claims.**
- A. **Petitioner Could Not Have Had a Hearing in the Probate Court on the Merits of Either of Her Equitable Claims on Her Exceptions to the Inventory Because Under the Decisions of the Supreme Court and Courts of Appeals of Ohio Then in Effect, the Probate Court Then Had No Jurisdiction of Such Equitable Claims in That Proceeding.**

As shown by the authorities hereinafter cited, the Probate Court in Ohio has always been a court of limited jurisdiction. It has always had some equitable powers, but has never been a court of general equity jurisdiction. Both before and after the adoption of the Probate Code in 1932 the court had jurisdiction over only such matters as was conferred upon it by statute (Article IV, Section 8, Constitution of Ohio (Appendix, page 49)), and such as was necessarily incident thereto.

Section 10501-53, Ohio General Code (Appendix hereto, page 50), is the controlling section. It does not give the Probate Court authority over trusts and trustees (except testamentary trustees). It does, however, authorize the Probate Court,

“3. To direct and control the conduct, and settle the accounts of executors and administrators, and order the distribution of estates”;

and in so doing the court has “plenary power at law and in equity fully to dispose of any matter *properly* before the court,” (see last paragraph, Section 10501-53). (Appendix, page 50) (*Italics ours.*)

The primary question here, therefore, is whether the Probate Court, by virtue of this section, could (prior to the present decision), on exceptions to an executor's inventory, exercise the powers of a court of general equity jurisdiction and hear and determine questions, such as are the basis of the present suit, (a) as to the existence of an express trust affecting the inventoried property, and (b) as to whether equitably a constructive trust should be impressed upon such property.

Except the decision in the present case, the decisions in Ohio are uniformly to the effect that the Probate Court is without jurisdiction to hear and determine such questions.

In order to demonstrate the lack of jurisdiction of the Probate Court of such matters, under the law of Ohio, as it stood prior to the present decision, it will be helpful to consider how such trust issues had been classified in Ohio for judicial consideration, and whether claims of such character could “properly” come before the Probate Court and be determinative of exceptions to an in-

ventory. For convenience we shall discuss this subject under separate headings numbers (1), (2), (3), (4), (5) and (6), following.

- (1) **It Was the Law of Ohio That Trusts and the Rights of Beneficiaries of Trusts Were "Peculiarly Within the Province" of the Court of Common Pleas, That Being a Court of General Equity Jurisdiction, and That Suits, Such as This, Constituted Equity or Chancery Cases Under Section 6, Article IV, of the Constitution of Ohio, and As Such Were Triable DE NOVO in the Court of Appeals.**

Section 4 of Article IV, of the Constitution of Ohio, (Appendix page 49), provides that, "The jurisdiction of the courts of common pleas, and of the judges thereof, shall be fixed by law."

The Ohio General Code provided at the times involved in this proceeding:

"The court of common pleas shall have original jurisdiction in all civil cases where the sum or matter in dispute exceeds the exclusive original jurisdiction of justices of the peace * * *."
(Sec. 11215, Appendix page 54.)

and

"There shall be but one form of action, to be known as a civil action. This requirement does not affect any substantive right or liability, legal or equitable." (Sec. 11238, Appendix page 55.)

The Court of Common Pleas is therefore the Ohio court which has initial general equity jurisdiction and accordingly the Ohio courts have uniformly held that suits to compel trustees to perform the duties of their trusts are peculiarly within its jurisdiction.

In *Caldwell vs. Caldwell*, 45 O. S. 512, (1888), the plaintiff was the beneficiary of a trust set up by a will and brought his suit in the Court of Common Pleas against the administrator, claiming the property (which had been purchased by the administrator) was still subject to the trust and seeking its resale. The Supreme Court held the suit had been properly brought in the Court of Common Pleas and in its opinion said in part:

“* * * The theory of the plaintiff’s case, is that to the extent of these lands, the trust confided to the defendant has never been executed, and that he now holds them, subject to administration, and in trust for the beneficiaries, of the will of the testator; that he refuses to proceed with the execution of such trust, claiming to be the absolute owner in fee, in his individual right, of these lands, wherefore the plaintiff seeks to compel the execution of such trust. Upon this theory, if properly assumed, he sought the proper tribunal—the court of common pleas. *The probate court affords no remedy to a party seeking to set aside such conveyance, so as to compel an administrator, executor, or testamentary trustee, to perform a trust which he refuses to execute. This is peculiarly within the province of a court of general equity jurisdiction* * * *.” (P. 521)* (Italics ours.)

In *Brinkerhoff, Trustee vs. Smith et al.*, 57 O. S. 610 (1897), the action was commenced in the Court of Common Pleas. An agreement to hold certain property in trust was involved. The court said, syllabus three:

“An action to enforce the trust is a civil action, equitable in its nature and governed by the provisions of the code of civil procedure. * * * The

* In Woerner’s “The American Law of Administration,” Vol. 1, page 508, the author cites this case as authority for the proposition that Probate Courts possess no power “over any purely equitable right.”

action being properly cognizable in equity, the court in which it is pending, possesses in regard to it the general jurisdiction that appertains to courts of equity, and may hear and determine every issue of law or fact joined between the parties, * * * and its determinations, as in other cases, are conclusive."

Gilbert vs. Sutliff, 3 O. S. 129 (1853), in which that court said, page 148:

"* * * The jurisdiction of courts of equity over trusts and trustees is plenary. * * *"

Berkmeyer vs. Kellerman, 32 O. S. 239 (1877):

"It is the peculiar province of equity to take cognizance of transactions growing out of relations of trust, and to prevent those holding such positions from using them and their influence for their own aggrandizement." (Syl. 1.)

Madden, Exr., vs. Shallenberger, 121 O. S. 401 (1929).

"Except as restricted by statute, the Court of Common Pleas has such jurisdiction in equity as Courts of Chancery had at common law. Courts of Chancery at common law had jurisdiction of trustees, beneficiaries of trusts and trust estates." (Syl. 1.)

The Court of Appeals for Allen County in *Huntington National Bank vs. Fulton*, 49 O. A. 268 (1934), (under the present Probate Code), said, pages 276, 277:

"It was not within the jurisdiction of the Probate Court to engraft or enforce trusts or liens on the funds of the trust company, as the Probate Court is not vested with general equitable jurisdiction authorizing it to engraft or enforce such trusts or liens, * * * The Common Pleas Court has jurisdiction not only in the matter of the al-

lowance of claims against banks in process of liquidation, but has general equitable jurisdiction as well, and is the only court in which the relief sought in this action could be granted, * * *."

An important factor in connection with the classification of the claims to enforce express and constructive trusts as chancery suits coming under the original jurisdiction of the Court of Common Pleas is that being chancery suits the Court of Appeals has "appellate jurisdiction" on them, *i.e.*, they are appealable to and triable *de novo* in the Court of Appeals by virtue of Section 6, Article IV, of the Constitution of Ohio. (Appendix page 49.)

"In a chancery case in the Court of Appeals, the parties have a constitutional right to have their case tried *de novo*, being permitted to introduce competent evidence under the legal rules applicable in the trial of questions of fact in trial courts." (Syl.) *Kiriakis vs. Fountas*, 109 O. S. 553 (1924)

The present case, being such a chancery case, was so appealed by Respondent, and tried de novo in the Court of Appeals.

- (2) **It Was the Law of Ohio That the Probate Court Was Not a Court of General Equity Jurisdiction and Had Only Such Equity Powers As Had Been Given It for Specific Purposes, and Such As Are Necessarily Incident Thereto, and Had No Jurisdiction Over Trusts and the Rights of Beneficiaries of Trusts.**

It is not only true, as just shown by section (1) above, that it was the law of Ohio that such trust ques-

tions as are here involved were peculiarly within the province of the Court of Common Pleas, but it was further true that the Probate Court had *no* jurisdiction thereof.

As stated in *Caldwell vs. Caldwell*, 45 O. S. 512-521 (1888), *supra*:

“* * * * The probate court affords no remedy to a party seeking to set aside such conveyance, *so as to compel an administrator, executor, or testamentary trustee, to perform a trust which he refuses to execute.* This is peculiarly within the province of a court of general equity jurisdiction. * * *” (Italics ours.)

In *Gilliland vs. Sellers*, 2 O. S. 223 (1853), the Supreme Court said, “The decree of a probate court in Ohio, involving the exercise of the general jurisdiction of a court of equity, must be considered as *coram non jure* and void,” and accordingly held that a decree of the Probate Court of cancellation of a mortgage in proceedings to sell land of an intestate was void.

In *State ex rel. Black, Executor, vs. White, Judge*, 132 O. S. 58 (1936), the question was whether the Probate Court or the Court of Common Pleas had jurisdiction of a suit for specific performance of a contract for the sale of real estate by executors of an estate being administered by the Probate Court. The court held that the suit was within the jurisdiction of the Court of Common Pleas, that “being a court of general equity jurisdiction” paragraph five, syllabus) and said of the Probate Court, page 66:

“* * * The Probate Court is a court of limited jurisdiction, having only such power as is conferred upon it by the constitution and statutes of

Ohio, and has not the inherent general jurisdiction of common-law and chancery courts. 37 Ohio Jurisprudence, 177, Section 159.

"There is no question that the General Assembly of Ohio has in certain instances delegated equitable jurisdiction to the Probate Courts, but a careful perusal of all these grants of jurisdiction fails to disclose the delegation of power to entertain suits for specific performance. * * *"

The court then quoted as still applicable its statement in *Gilliland vs. Sellers*, 2 O. S. 223, above set forth. The *Black* case arose after the adoption of the present Probate Code of Ohio in 1932, and the decision therein clearly shows the adoption of the code did not enlarge the subject matters over which Probate Courts have jurisdiction.

In *Goodrich, Admr., vs. Anderson*, 136 O. S. 509 (decided April 24, 1940, the same day as the case at bar), the question was whether the Probate Court had power to render a money judgment in an action under Sections 10506-67, *et seq.*, of the Ohio General Code (Appendix page 51) relating to proceedings to discover concealed or embezzled assets, which sections are a part of the present Probate Code. The court held it had no such jurisdiction, and said in the opinion, page 511:

"The character of the proceeding is the same in the Court of Common Pleas as in the Probate Court. It is special and does not come within the orbit of a civil action for money only. While the authority of the court under such a proceeding is very broad for the purpose of discovering concealed or embezzled assets, it is not broad enough to litigate all the issues in the instant case, where the ultimate objective is a money judgment and where there has been no concealment of assets. To

*that extent there is a limitation upon the 'plenary power' granted to Probate Court in the last paragraph of Section 10501-53, General Code. * * **

" * * The proceeding is special and designed to facilitate the administration of estates, but it may not be used primarily as a substitute for a civil action for a money judgment wherein pleadings are required properly to define the issues." (Pp. 511, 512.) (Italics ours.)*

By the same reasoning it would seem to follow that exceptions to an executor's inventory, being also a "special" proceeding "designed to facilitate the administration of estates," "may not be used primarily as a substitute for a civil action" for the enforcement of trust rights such as are here involved, and such, as we show herein, was the law of Ohio prior to the present decision.

What the court said in the *Goodrich* case is, we submit, the direct opposite of what was said by the same court on the same day in the present case, page 521, as follows:

"Plaintiff insists, however, that a case on exceptions to an inventory is a special statutory proceeding at law and only questions of legal title may be considered. This view is not broad enough. Of course the Probate Court exercises limited jurisdiction and on appeal and trial *de novo* the jurisdiction of the Court of Common Pleas would not be extended beyond that of the court below. Nevertheless the Probate Court is vested with full power to determine what property is lawfully included in an inventory as assets and as incidental thereto has jurisdiction to inquire whether inventoried personal property belongs to an exceptor as the beneficiary of a trust. Under Section 10501-53, General Code, the Probate Court has 'plenary power at law and in equity fully to dispose of any matter properly before the court,'

unless otherwise provided by statute. Compare *Goodrich, Admr., vs. Anderson, ante*, 509. There is no statutory provision which limits or denies to that court power to hear and determine fully and completely all questions raised by exceptions to an inventory of the assets of a decedent's estate. The application of the doctrine of *res judicata* is not narrowed herein because the court of origin was not invested with general jurisdiction." (*Bolles vs. Toledo Trust Co.*, 136 O. S. 517-521.)

But, as hereinafter shown, (Sections (4), (5) and (6) following) exceptions to an executor's inventory, under the prior decisions of the Supreme Court, did not bring "properly before the court" or involve at all, questions as to equitable rights of third persons, in the property of the decedent because it is the duty of the executor to administer and account for such property and hence such property is lawfully included in an inventory as "assets" notwithstanding the existence of such questions.

Other cases showing the limited jurisdiction of the Probate Court are *Saxton vs. Seiberling*, 48 O. S. 554 (1891), holding that the Probate Court had no power to set aside a deed of conveyance made in pursuance of its own order of sale on the ground that the sale was tainted by fraud; *First National Bank vs. Beebe*, 62 O. S. 41 (1900), holding that a Probate Court in making an order of distribution had no jurisdiction to determine the persons to whom the distribution should be made; *Vandembark vs. Mattingly*, 62 O. S. 25 (1900), holding that the Probate Court does not have jurisdiction of an action in the nature of a creditor's bill brought under authority of Section 5464 of the Revised Statutes because of the pen-

dency in that court of a petition for an order to sell lands by an assignee for the benefit of creditors.

In *Halloran vs. Merritt, Admr.*, 48 O. A. 135 (1934), a proceeding to recover embezzled assets, the court said:

“* * * As presented, the proceedings assumed the character of a suit in equity, whereas in fact the proceedings were special and summary in nature, not a civil action within the meaning of the code, and were limited to the purposes specified in the statute. Moreover the Probate Court is a court of limited jurisdiction, and the limited purposes of the complaint were not enlarged by the filing thereof and the hearing had thereon in the Court of Common Pleas.” (P. 137.)

Thus it appears that the courts of Ohio have held with uniformity, except in the case at bar, that matters which are proper for consideration only by a court of general equity jurisdiction in a chancery case are not properly brought before the Probate Court (especially by a “special proceeding” therein, such as exceptions to an inventory), and are not within its jurisdiction, unless *expressly* placed there by statute, notwithstanding the fact that it has, under Section 10501-53, Ohio General Code (Appendix, page 50), “plenary power * * * in equity fully to dispose of any matter *properly* before the court.” (Italics ours.)

As the decisions herein cited show, this statutory provision did not make the Probate Court a court of general equity jurisdiction or enlarge the “matters” which might be brought before the court. It merely gave power “fully to dispose” of such matters as are *properly* brought before the court. There is no express statutory authority granted to Probate Court to hear and determine trust questions such as those in this case.

- (3) It Was the Law of Ohio That Proceedings on Exceptions to an Account (Held by the Supreme Court of Ohio Herein To Be **RES JUDICATA** of This Chancery Case) of an Executor Are Special Statutory Proceedings and Are Not Equity or Chancery Cases Under Section 6, Article IV, of the Constitution of Ohio, and are Not Triable **DE NOVO** in the Court of Appeals.

We have for consideration here not only the law of Ohio, as it was prior to the present decision, with respect to the general jurisdiction of the Probate Court, but also the narrower question as to its then jurisdiction on exceptions to an executor's inventory.

It was the law prior to the decision herein, that such equitable matters as are involved herein did not come within its jurisdiction on such proceedings. As we have shown in Section 1 such suits as this are "chancery cases" appealable for trial *de novo* to the Court of Appeals, but this is not true of exceptions to an executor's inventory or other account. The Supreme Court of Ohio so held in *In re Estate of Gurnea*, 111 O. S. 715 (1924), syllabus paragraphs 1 and 2:

"1. The settlement in the Probate Court of the account of an executor does not constitute a chancery case.

"2. The appeal to the Court of Common Pleas of the settlement of the account of an executor in the Probate Court is purely statutory and does not constitute a chancery case; hence the judgment of the Court of Common Pleas upon such an appeal from the Probate Court is not appealable to the Court of Appeals under Section 6, Article IV, of the Constitution of Ohio."

See to the same effect *In re Estate of Chapman*, 13 O. A. 186 (1920).

Thus exceptions to an account or to an inventory of an executor may not be appealed to and tried *de novo* in the Court of Appeals because proceedings on such exceptions do not constitute a chancery case, but the present case, being a chancery case, *was so appealable and was so appealed* (by respondent) *and tried de novo in the Court of Appeals*.

Therefore, since (a) trust claims such as we have here constitute a chancery case, and (b) proceedings on exceptions to an inventory do not constitute a chancery case, it follows that *on exceptions to an inventory* the Probate Court could not have and does not have jurisdiction of such trust claims as were raised in the present case.

Also, it follows, since (a) suits such as this are appealable for trial *de novo* to the Court of Appeals, and (b) exceptions to an inventory are not so appealable to the Court of Appeals, that petitioner's rights asserted in this suit were not the proper subject of exceptions or within the limited jurisdiction of the Probate Court on hearing of exceptions as it had been defined by the Supreme Court of Ohio at the time petitioner's exceptions were filed and heard.

- (4) **It Was the Law of Ohio That the Probate Court Did Not Have Jurisdiction on Exceptions to an Executor's Inventory and Analogous Proceedings to Hear and Determine Questions of Equitable Title or Right Between the Executor and the Exceptor Because It Was the Executor's Duty to Inventory All Property in Which Its Testator Had Any Interest.**

The Probate Code, G. C. Section 10509-41 (Appendix, page 52), as in effect at the time here involved, required every executor or administrator to make and return on oath into court,

"* * * a true inventory of the real estate of the deceased, and of the goods, chattels, moneys, rights and credits of the deceased, by law to be administered, and which have come to his possession or knowledge, * * *."

Section 10509-51, General Code (Appendix, page 53), provided,

"The inventory shall contain a particular statement of all bonds, mortgages, notes and other securities for the payment of money, belonging to the deceased, known to such executor or administrator, specifying, * * *."

Section 10509-52, General Code (Appendix, page 53), contained a similar provision as to debts and accounts belonging to the deceased. Section 10504-71 (Appendix, page 51), provided:

"*Any* estate, right or interest in lands or personal estate or other property of which the decedent was possessed at his decease shall pass under the will unless the *will* manifest a different intention." (Italics ours.)

The foregoing sections of the statutes clearly indicate that the policy of this state was that "any" legal or equitable interest which the decedent has in property shall be included in the inventory. This is emphasized by the amendment to Section 10509-41 adopted in 1935 (Appendix, page 52) by which it is provided as to real property *without* the state, the executor shall file a "separate schedule describing *any* legal or equitable interest" the decedent had therein. Clearly the legislature must have regarded Sections 10509-41 and 51 (Appendix, pages 52 and 53) as they stood to prescribe this same duty as to property *within* the state. In Addams & Hosford's authoritative work entitled "Ohio Probate Practice and Procedure," 2nd Ed., it is said, page 743:

"Importance of the inventory. * * * The taking of a proper inventory is one of the most important duties devolving upon an administrator or executor in the discharge of his trust. It is important to him because it shows, or should show, just exactly what property is to be administered, and the probable value of it. In a controversy with an heir or creditor, it is invaluable to him as showing these facts, and thus prevent him from being charged for that which may never have come into his possession. To the heir, creditor or other interested person in the estate it is alike invaluable, for if there is no inventory, or if the inventory be an improper one, no information is given to the heir or creditor as to what the administrator ought to be properly charged with. It also follows that great care should be exercised in having all the assets of the estate enumerated, and likewise a value fixed thereon. * * *"

At page 749 of the same work it is said:

"* * * Property claimed by another, but found among the assets of the estate, must be inventoried unless it clearly appear that such property does not belong to the deceased."

From the foregoing, it seems clear that exceptions to the inventory were not intended to be the means for the adjudication of claims for less than the full legal and equitable title to the inventoried property, as it is the *duty* of the executor under the express wording of the statutes to include in his inventory any property which comes into his possession or to his knowledge in which the testator had *any* legal or equitable right. The claim that there was an outstanding equitable title would therefore be immaterial on the hearing of the exceptions and such claim could not "properly" be adjudicated on such proceedings. The decisions of the courts of Ohio, except in the case at bar, are in accord with this statement. Thus in *Keever vs. Brown, Executrix*, 36 O. A. 1 (1930), it was held:

"* * * while the Probate Court was right in requiring the executrix to cause her inventory to show the statutory setoffs to the widower, his order in that respect does not constitute an adjudication of the question whether the particular widower has by ante-nuptial contract or otherwise barred himself from taking the property so nominally set off to him." (P. 8.)

The Court of Appeals quoted in support of that conclusion from a prior unpublished opinion of the same court in *Connolly vs. Connolly* in part as follows:

"We conclude, therefore, the Probate Court was without jurisdiction to determine the validity of the contract between Connolly and wife in so

far as it might affect the latter's right to an allowance either one way or the other, and therefore erred in holding, as it did, that the contract was a bar to this right. * * *'' (36 O. A. 8.)

In so holding in the *Connolly case* the court expressly stated that it was bound by and was following the decision of the Supreme Court in *Baldwin vs. Broadstone*, 54 O. S. 653, 46 N. E. 1155 (1896), unreported, as shown by the synopsis of points there decided set forth in 35 Ohio Law Bulletin, page 161. Point 1 of that synopsis reads:

"The Probate Court has no jurisdiction of the question to set aside the year's allowance to a widow, on the ground that she agreed not to ask it by ante-nuptial contract."

In *Juhasz vs. Juhasz*, 134 O. S. 257 (1938), the court had before it the direct question of the jurisdiction of the Probate Court on exceptions to an inventory under the present Probate Code. There the executor in inventorying the property had failed to set off the statutory exemptions and year's allowance to the widow because an ante-nuptial agreement incorporated in the will purported to bar the widow therefrom. The Supreme Court held that the Probate Court had properly held that it did not have jurisdiction to pass upon such questions on exceptions to the inventory.

See also *Goodrich, Admr., vs. Anderson*, 136 O. S. 509 (April 24, 1940), (*supra*); *Richardson vs. Richardson*, 28 O. L. A. 497 (1938), (Court of Appeals, Medina County).

In re Trust Created Under Will of Joseph B. Rich, 3 O. O. 315 (1935), (decided by the Probate Court of Franklin County), it was said, referring to sub-paragraph

13 of Section 10501-53, Ohio General Code (Appendix, page 50), defining the jurisdiction of the Probate Court:

"In regard to the last paragraph referred to, in which the Probate Court is given plenary power, it is our opinion that this refers and is restricted to the specific jurisdiction given in the paragraphs immediately preceding it. In other words, the Probate Court has plenary power in law and in equity in matters over which it has specific jurisdiction as set forth in the statute, and conversely if the authority is not specifically given the Probate Court has no such authority. * * * We fail, however, to find any specific authority in the above mentioned statute to terminate a testamentary trust, and had the legislature so intended it would have so worded the statute that specific authority would have been given." (P. 316.)

Section 10501-53, Ohio General Code, is set forth in full in the Appendix hereto, page 50. It will be searched in vain for any suggestion that authority has been given to the Probate Court to enforce the rights of beneficiaries of express trusts (not testamentary) or to engraft constructive trusts upon property in the possession of executors.

That the trust here in question was not a testamentary trust is clear:

"When a settlor creates an effective trust in his lifetime, the disposition is not testamentary because there is to be no application of the property to charitable or other purposes until after his death. * * *" *Cleveland Trust Co. vs. White*, 134 O. S. 1-7.

The Supreme Court of Ohio, in its opinion herein, ignored and in effect overruled without comment the foregoing decisions which, while in effect, directly estab-

lished that the Probate Court did not have jurisdiction on exceptions to the inventory to pass upon petitioner's present equitable claims and on which petitioner was entitled to rely in refraining from asserting her equitable claims in support of her exceptions.

We think it appears that at the time the petitioner's exceptions were before it in the former case, the Supreme Court itself must then have been of the opinion that petitioner's equitable rights could not be raised in support of her exceptions in that proceeding because it entered final judgment therein, because of insufficient evidence of delivery, although it is the settled law of Ohio that where an appellate court reverses a case on the weight of the evidence,

“* * * the defendant in error is *entitled* to a remand, to afford an opportunity for an amendment of the pleadings, or the production of additional evidence, if any, to cure the defects in the record of the former trial.” (*Bank vs. Shadyside Coal Company*, 121 O. S. 544 (1930), syllabus 3.) (Italics ours.)

Petitioner, as appellee in the former case above cited, filed two applications in the Supreme Court urging that it remand that case for further proceedings, and specifically called the court's attention to the rule of *Bank vs. Shadyside Coal Company*, *supra*, but the court declined so to do and entered final judgment. It seems reasonable to assume that it would not have thus ended all opportunity for petitioner to present her equitable claims by amending her exceptions to the inventory if the court had then entertained the view that that was a proper proceeding for their adjudication.

- (5) It Was the Law of Ohio That an Executor Succeeds to the Title and Trust Duties of His Testator as to Property Held in Trust, and Hence it is an Executor's Duty to Inventory and Administer Such Property in Accordance With Law, and, Accordingly, on Exceptions to an Inventory the Probate Court Had No Jurisdiction to Determine the Existence or Non-Existence of a Trust.

As shown in Section (4) hereof, by Section 10509-41, Ohio General Code (Appendix, page 52), it is made the duty of the executor to list in the inventory,

“* * * the goods, chattels, moneys, rights and credits of the deceased by law to be administered, and which have come to his possession or knowledge, * * *.”

The securities which are here in question all stood of record in the name of respondent's testator at the time of his death and were unendorsed. (R. 316.) There was no written assignment or declaration of trust. The existence of such securities came to the knowledge of the executor and it took possession of them. Thereupon it became the express duty of the executor, by virtue of Section 10509-41, (Appendix, page 52) to list such securities in its inventory, and this regardless of whether they were the subject of an express trust or of a possible constructive trust.

In *Dayton vs. Bartlett*, 38 O. S. 357 (1882), the surviving partner of a partnership died, and the court, speaking of his executor, and of such surviving partner's estate, said, page 364,

"As an incident to the settlement of that estate, he must settle the partnership estate. He cannot accept the former duty without having the latter imposed upon him, unless equity, for sufficient reasons, appoints a receiver or trustee to settle the partnership separately, and relieves him from this incidental trust. Unless he is relieved from this trust by agreement of the parties, or by a competent court, it is part of his official duty as representative of the survivor to wind up the partnership, and ascertain and distribute the surplus or liability of the deceased partners before he can finally settle the individual estate. * * *

"* * * he" (the deceased surviving partner) "was a trustee of the firm. Upon his death, the law cast that duty upon his personal representative, not as owner of the property, but as a trustee in possession, acting for the estates of all the deceased partners." (Pp. 364, 365.)

In *Deering Harvester Company vs. Keifer*, 20 O. C. C. 311 (Circuit Court of Hancock County, 1900), it appeared that an agent of the Harvester Company, in violation of his contract with it had intermingled funds belonging to it with his own funds and used the money for the purchase of goods for his store and in paying its operating expenses. He then died. The court said, syllabus 2:

"And in such case, if the agent dies insolvent leaving the amount due his principal unpaid, said stock of goods into which the trust funds can be traced, passes to the administrator of his estate impressed with the trust, and the court may order the administrator to allow and pay as a preferred claim, the debt so due the principal, from the proceeds of the sale of said stock. * * *"

The rule followed by the above Ohio authorities is one generally recognized.

Cazallis et al. vs. Ingraham et al., 110 Atl. 359 (Supreme Judicial Court of Maine, 1920);

Boyer et al. vs. Decker, 40 N. Y. S. 469 (Supreme Court, Appellate Division, 1896);

Gulick's Adm'rs vs. Bruere, Trustee, etc., 9 Atl. 719 (Court of Errors and Appeals of New Jersey, 1887);

Kauffman et al. vs. Foster, 86 Pac. 1108 (Court of Appeals, California, 1906);

Boone vs. Citizens' Savings Bank, 38 Am. Rep. 498; 84 N. Y. 83;

Tyler vs. Mayre et al., 27 Pac. 160, 30 Pac. 196 (Supreme Court of California);

In re Thurston, 145 Atl. 110 (Prerogative Court of New Jersey, 1929);

Friedley et al. vs. Security Trust & Safe Deposit Co., 84 Atl. 883 (Court of Chancery, Delaware, 1912).

The foregoing Ohio authorities show that the existence of petitioner's claims of express and constructive trusts, did not affect the duty of the executor to inventory these securities. If there was an express trust, the executor became the successor trustee, charged with the duty of carrying out the trust. If there were no express trust, but the circumstances were such that a constructive trust should be equitably engrafted upon the securities, the executor took them subject to the liability

that that might be done, but in either case he was accountable for them and required to inventory them, since in either case, the legal title having been in its testator at the time of his death, they would be "goods and chattels * * * of the deceased, by law to be administered" under Section 10509-41 O. G. C. (Appendix, page 52). In view of the decisions hereinbefore cited, and of the statutory duty of the executor, it is clear that the executor in the case at bar properly included the securities in question in the inventory and that it would have been his duty to do so, even though he had been of the opinion that they were subject either to an express or a constructive trust, for they were still, in either event, assets of the estate by law to be administered, either by distribution to the distributees under the will, if there were no trust, or to the beneficiary of the trust, if there were a trust.

The respondent claimed in the courts below that the case of *Quinby vs. Walker*, 14 O. S. 193 (1863), holds that an executor does not have to inventory or account for property held by his testator in trust. If the case so held it would no longer be authoritative in Ohio because of the later decision in *Dayton vs. Bartlett*, 38 O. S. 357 (1882, *supra*). In fact, however, it does not so hold. There the property, which came into the possession of a person who was an executor, had never been in the possession of his testator. The court points out that the executor did not obtain possession of the property as such, but as a trustee under a voluntary assumption of duties outside of his duties as executor.

From the foregoing, it follows (a) that it was the law of Ohio (prior to the decision herein), that a claim of express or constructive trust would not sustain ex-

ceptions to the executor's inventory, because, even if such claims were valid, it was, nevertheless, the executor's duty to inventory the property, (b) that, therefore, exceptions to an inventory would not "properly" bring before the court any question with respect to such trust claim, and (c) that accordingly the Probate Court had no jurisdiction of such question and no bar with respect thereto could arise from the decision on the exceptions.

- (6) It Was the Law of Ohio That a Constructive Trust Is Purely a Creature of Equity and Consequently a Probate Court Had No Power to Impress a Constructive Trust, on Hearing of Exceptions to an Inventory, and, Hence, a Claim of Constructive Trust Could Not Be Barred by Decision on Exceptions.**

Although in its *opinion* the Supreme Court of Ohio does not refer to petitioner's claim of constructive trust, it nevertheless entered final *judgment* against her dismissing that claim as well as her claim of express trust. (R. 476.) In its opinion the Supreme Court merely said:

"The alleged trust is based upon a claimed agreement or understanding between her" (the petitioner) "and her late husband, * * *." (P. 517.)

This clearly refers only to petitioner's claim of express trust.

The Court of Appeals decree sustained both petitioners' claim of an express trust and her alternative claim of a constructive trust (opinion, R. 481), and

found "upon the issues joined in favor of the plaintiff-appellee in all respects." (R. 340).

It has long been the settled law in Ohio that if the right result is reached in a lower court the Supreme Court will affirm, regardless of whether in its opinion the right reason was assigned by the court below.

Hawver vs. Whalen, 49 O. S. 69 (1892);

Dayton vs. Goldsberry, 84 O. S. 454 (1911).

The effect of this *judgment* of the Supreme Court of Ohio was clearly to deprive petitioner of any possible opportunity ever to have had her claim of constructive trust adjudicated anywhere.

Petitioner's claim of constructive trust was not a title to or even an interest in the property involved. It was, until sustained by some court of competent jurisdiction, a mere cause of action.

A constructive trust is purely a creature of equity.

Hout vs. Hout, 20 O. S. 119 (1870);

Crooks vs. Crooks, 34 O. S. 610 (1878);

Klaustermeyer vs. Cleveland Trust Company, 89 O. S. 142 (1913).

As stated by Mr. Justice Cardozo for the Court of Appeals of New York in *Beatty vs. Guggenheim Exploration Co.*, 225 N. Y. 380, 386, 122 N. E. 378:

"* * * A constructive trust is the formula through which the conscience of equity finds expression. * * *" (P. 380.)

A constructive trust does not come into existence until it has been claimed and a decree of a court of general equity jurisdiction has impressed it upon certain property.

- Stoehr vs. Miller*, 296 Fed. 414-417 (C. C. A. 2nd, 1923);
 Bogert, Trusts and Trustees, page 1456,
 Section 472;
 40 Ohio Jurisprudence, Title "Trusts," Section 76, page 240;
 Restatement of the Law of Restitution, Section 160a, page 641.

When the Supreme Court held in this case, as it did by its judgment, although not by its opinion, that it was petitioner's duty in support of her exceptions to the executor's inventory in the former proceeding to assert in addition to her legal title, not only that she held equitable title by virtue of an express trust, but also to claim that if it should be determined that she held neither legal nor equitable title that the Probate Court should nevertheless sustain her exceptions to the inventory by impressing (and thus for the first time creating), a constructive trust upon the property, the Supreme Court clearly retroactively imposed a duty upon petitioner which was non-existent at the time her exceptions were filed and heard in the Probate Court. This is clearly shown by the decisions in Sections (1) to (5) preceding.

The executor clearly could not be relieved from the mandatory duty imposed upon it by Section 10509-41, Ohio General Code (Appendix, page 52), to inventory the goods and chattels of the deceased "by law to be administered" merely because petitioner asserted the existence of facts which might or might not result in the impressing of a constructive trust upon the property. For aught an executor knows, under such circumstances,

at the time its duty to file its inventory arises, such claim may never be asserted in court. The executor itself is not a court, and it could not in this case by any action on its part have given rise to a constructive trust or *absolved itself from the duty of inventorying the property as assets of the estate because of petitioner's claim*. It seems clear, therefore, that under the law as it stood prior to the judgment of the Supreme Court herein, exceptions to the executor's performing its duty in inventorying the property could not "properly" bring before the Probate Court the subject matter of the claimed constructive trust. Such a claim would not have been material in determining whether the executor had properly inventoried the property because, whether or not the facts were found to be such as would justify a court of general equity jurisdiction in impressing a constructive trust, in either event, the holding on exceptions would have necessarily been (a) that the executor had properly inventoried the property, (b) that the exceptions were not well taken, and (c) that as the claim of constructive trust had no bearing upon the propriety of the inventory as filed such claim was not properly before the court and must be dismissed for want of jurisdiction. This was plainly the effect of the statutory law and decisions of the courts of Ohio prior to the present decision.

Under the judgment (as distinguished from the opinion of the Supreme Court in the case at bar), all of this former law is disregarded, retroactively as to petitioner, and this, we submit, amounts to a denial of due process under the Fourteenth Amendment.

B. Petitioner Has Been Denied Any Opportunity for Hearing on the Merits of Her Claims by the Decision Herein That She Should Have Submitted Her Equitable Rights to the Probate Court in the Former Proceedings, As That Decision Came at a Time When It Was Too Late for Her to Proceed in That Manner.

The discovery by the Supreme Court of Ohio that the Probate Court has jurisdiction to hear and determine, not only questions with respect to the rights and liabilities of trustees and beneficiaries of express trusts, but also to impress constructive trusts upon property upon exceptions to an inventory (which, as we have shown, is the effect of its *judgment*), comes too late to permit the petitioner to act in pursuance of it. She was necessarily guided by the decisions in effect when her exceptions were filed and heard, which showed that the Probate Court lacked any such jurisdiction. In fact, her original exceptions as filed in the Probate Court (R. 412) were amended in the Court of Common Pleas (R. 360) in a manner which made it certain, if she prevailed, that it could not be successfully claimed that she had prevailed by reason of the enforcement of equitable rights not within the jurisdiction of the Probate Court.

The time for filing exceptions had long gone by, and the proceedings on the exceptions filed had long been terminated by final judgment of the Supreme Court of Ohio against petitioner thereon, when the opinion herein was filed, and as hereinbefore shown. that court denied to petitioner any opportunity to present her equitable claims by amendment of her exceptions after its adverse decision, by refusing to remand the case for further proceedings.

We submit it is clear beyond dispute by the discussion under the foregoing sub-headings (1) to (6), that the present decision of the Supreme Court of Ohio has deprived petitioner of the right to a hearing on the merits of her equitable claims by retroactively (as to her) enlarging the jurisdiction of the Probate Court, and imposing on her retroactively the duty theretofore non-existent of submitting purely equitable rights, constituting a chancery case, to that court on a "special proceeding."

C. The Rules As to What Constitutes RES JUDICATA Have Been Retroactively Changed as to Petitioner by the Present Decision, in a Manner Which Imposes on Her a Duty to Have Asserted Her Equitable Rights in the Probate Court, Although No Such Duty Existed Under the Law of Ohio, When Her Exceptions Were Filed and Heard, Bars Her From Any Consideration of the Merits of Her Claims, Because She Did Not Do So and Thereby Deprives Her of Any Opportunity for a Hearing on the Merits.

(1) **Prior to the Decision Herein It Was the Law of Ohio That a Party Litigant in That State Had the Right in One Action to Assert Full Legal Title to Property, and, Failing on That Claim, Then to Assert Any Equitable Title or Right in a Separate Suit, and That the Judgment in Such First Case Would Not Be RES JUDICATA in Such Second Case.**

The claim or demand which petitioner mistakenly attempted to maintain in support of her exceptions in the former case was that she *had* become the owner of the

full legal title to the securities during the lifetime of her husband as the result of a gift *inter vivos* of the legal title from him, and that the executor, hence, had *no* right, title or claim of any kind to the securities, and that, accordingly, the executor was not properly performing its duty when it included the securities in its inventory and should be required to turn them over to her as her property.

Bolles vs. Toledo Trust Company, 132 O. S. 21, 4 N. E. 2d 917.

In the case at bar her claim or demand in her first cause of action (R. 2) is based upon the proposition that she had *not* become the owner of the legal title during her husband's lifetime; that he remained the owner of such title subject to an express trust in her favor; that the legal title, subject to the trust and to the duty of distributing to her, as beneficiary of the trust, passed to the executor upon Bolles' death, and that *it was the duty* of the executor to include the securities in his inventory as a part of the goods of Bolles to be administered by the executor. In her second cause of action (R. 8) in the case at bar her claim or demand was similarly based upon the proposition that she had *not* become the owner of the legal title during George A. Bolles' lifetime; that he remained the owner of such title; that he had intended to give her the equitable title, by the creation of an express trust, and that if he had failed to accomplish his purpose the circumstances were such as that a constructive trust should be impressed upon the property for her benefit and that all of Bolles' title, subject to her right to have a constructive trust impressed upon the property, had passed to the executor upon Bolles' death, and that *it was*

the duty of the executor to include the securities in its inventory as a part of the goods of Bolles to be administered by it.

Under the law as settled for many years in Ohio, prior to the decision in the present case, petitioner's claims in her present action constituted causes of action separate and distinct from the claim asserted by her in support of her exceptions, that she had the full legal title to the property, and would *not* have been barred by the decision that she did not have such legal title.

In *Miller vs. Brown*, 33 O. S. 547 (1878), it appeared that in a prior action between the same parties it had been determined that Brown was entitled to a deed evidencing full legal title to 11 inches only out of a certain 15-inch strip of real estate. In a subsequent action in equity between the same parties, Brown asserted an easement to use the entire 15 inches as foundation for a wall, and claimed damages from Miller because Miller had cut away the foundation on the four inches as to which Brown's legal title had been denied in the former case. Miller claimed the former judgment was *res judicata*, but the Supreme Court of Ohio held against him, saying in part:

"The sole purport of that decree was that Brown was entitled to a deed for eleven inches and not fifteen. Nothing else was determined. No other rights were in issue. The court did not attempt to settle what rights Brown had in the four inches beyond the eleven. They said he was not entitled to a deed for those four inches, but they did not say he had no interest therein whatever. They did not say that circumstances could not create an easement therein. The decree only settled the rights between the parties as to what por-

tion of the land specified in the contract Brown was entitled to have conveyed to him by Miller." (P. 554.)

So in petitioner's former proceeding on exceptions to the inventory it was settled only that petitioner had not been vested with full legal title to the property by her husband during his lifetime. The court found she had not so received full legal title but, "they did not say (s)he had no interest therein whatever." Neither did they say that "circumstances could not create" a trust therein. We submit the case presents an exact parallel to petitioner's present and former suit.

In *Gibson vs. McNeely*, 11 O. S. 131 (1860), the court said:

"* * * The subject matter brought directly in issue in the two cases is not the same. In the former suit the plaintiffs sought to enforce certain alleged trusts, in which they claimed to be beneficially interested, under the will of Samuel Stitt. But, in this action, they set up a legal title, and claim to recover the possession of real estate, and their right to such recovery may not depend wholly on the questions adjudicated in the former suit." (Pp. 133, 134.)

The present petitioner in her former proceeding sought to enforce a legal title and in these proceedings she seeks to enforce certain trusts, and her right to recovery manifestly does not depend at all upon the questions adjudicated in the former case inasmuch as she necessarily accepts as the foundation of her present claim of equitable right and title the decision in the former case that legal title is in the respondent-executor.

In *Cleveland Trust Co. vs. White*, 134 O. S. 1-8 (1938), the court said:

"It is often remarked that a gift *inter vivos* and a voluntary trust are very nearly identical. This is not strictly true. A gift *inter vivos* bestows on the beneficiary both the legal and equitable title, while a trust conveys the equitable title only, the legal title resting in a trustee. 20 Ohio Jurisprudence 13, Section 10." (P. 8.)

In *Jones vs. Kilbreth*, 49 O. S. 401 (1892), the question was whether a prior judgment at law barred the establishment of a trust in equity claimed to have attached to the proceeds of a draft. The Supreme Court said:

"* * * It is claimed that a trust attached to the proceeds of the Dows & Co. draft, which were wrongfully placed in the trust estate, and which cannot be reached without the interposition of a court of equity. In seeking equitable relief in such case, we do not think that the plaintiffs in error are estopped by the judgment rendered in favor of Samuel Fosdick in the Superior Court. * * *"
(P. 414.)

Compare,

*Northern Assurance Company of London vs.
Grand View Bldg. Ass'n*, 203 U. S. 106
(1906), (opinion by Mr. Justice Holmes).

Prior to the decision herein it was the unquestionable law of Ohio settled by decisions of the Supreme Court of that state, that a former adjudication upon a *different claim or demand* is not a bar or an estoppel as between the same parties, except as to issues which were actually and necessarily decided in the former case.

Lessee of Lore vs. Truman, 10 O. S. 45 (1859);
Porter vs. Wagner, 36 O. S. 471 (1881);
Railroad Company vs. Ralston, 41 O. S. 573 (1885);
Jones vs. Kilbreth, 49 O. S. 401 (1892);
**Hixson vs. Ogg*, 53 O. S. 361 (1895);
Sauer vs. Downing, 109 O. S. 120 (1923);
Gibson vs. Solomon, 136 O. S. 101-103 (1939).

In the case at bar the Court of Appeals recognized and applied the rule that the decision of a legal cause of action is not a bar to equitable rights. That court said in part, speaking of the decision by the Supreme Court in the former case:

“The Supreme Court decided only the law questions before it. The door was not closed by it, but very definitely left open for such other remedies as the widow might have to secure what her husband intended to be hers, and this court is unable to see in what respect the former decision, on a strict question of law, is a bar to the present question of manifest equity.” (R. 487.)

The Supreme Court has now stated the law and made it retroactive as to petitioner that, “the general rule is that a former adjudication settles all issues between the parties that could have been raised and decided as well as those that were decided.” The court thus ignored the qualification theretofore in effect in Ohio that the statement quoted is true only as to issues

* Citing and following Mr. Justice Field's opinion in *Cromwell vs. County of Sac*, 94 U. S. 351 (1876).

"respecting the *same* claim or demand which was in issue in the former case."

The effect of the court's decision is that there was retroactively imposed upon petitioner the duty to set up in support of her exceptions separate, distinct and inconsistent claims or causes of action, although the law at the time she filed her exceptions was that she was under no duty so to do, but might try out her separate claims at law and in equity by separate proceedings. The result of this change in the law is to deprive plaintiff of any right or opportunity to have her equitable rights passed upon at all.

As hereinbefore shown, plaintiff could not under the law as it stood have had her equitable rights passed upon by the Probate Court on her exceptions to the inventory. Thus the court's holding that it was her *duty* to present her equitable rights on exceptions to the inventory means that it was her duty to do what would have been a futile thing if she had done it, and it now holds that because she did not do this futile thing she has lost all her equitable rights to the property in question.

However, even if she had had a *right* to present her equitable claims to the Probate Court and have them there passed upon in support of her exceptions, since, as we have shown, the law of Ohio was that legal and equitable rights are separate causes of action and may be separately asserted without defeat in one barring the other, it was not her *duty* to assert both rights therein, and it follows that to change that rule retroactively by imposing such duty upon her at a time when her opportunity to assert both rights in the former proceedings is gone, is enough in and of itself to offend against the con-

stitutional requirement of due process under the Fourteenth Amendment.

- (2) **Prior to the Decision Herein It Was the Law of Ohio that a Party, Being in Doubt as to Which of Several Rights or Remedies He Had, Might Test His Rights in Successive Suits Without Being Barred From Obtaining a Remedy He Actually Had, by First Trying to Enforce a Right or Remedy Which He Had Not.**

When the executor filed its inventory and included in it the property here in controversy, petitioner was placed in position where she had to determine what proceedings should be taken to protect her rights. As the law of Ohio then stood, she was entitled to take her choice of the possible rights and remedies either at law or in equity, and if her choice proved to be wrong, then to claim the other right and pursue the other remedy without being barred by the adverse result as to right first asserted and the remedy first sought. The Supreme Court of Ohio in *Conrad vs. Coal Company*, 107 O. S. 387 (1923) recognized and applied the rule which it quoted in the following language from Ruling Case Law:

“‘It is a well-established rule that the choice of a fancied remedy that never existed, and the futile pursuit of it, either because the facts turn out to be different from what the plaintiff supposed them to be, or the law applicable to the facts is found to be other than supposed, though the first action proceeds to judgment, does not preclude the plaintiff from thereafter invoking the proper remedy.’ 9 Ruling Case Law, 962, Section 9.” (Pp. 393-4.)

Again, in *Industrial Commission of Ohio vs. Brosekey*, 128 O. S. 372 (1934), the court approved the following statement from its decision in the *Conrad case*, *supra*:

“ ‘The fact that a party through mistake attempts to exercise a right to which he is not entitled or has made choice of a supposed remedy which never existed, and pursued it until the court adjudged that it never existed, does not preclude him from afterwards pursuing a remedy for relief, to which in law and good conscience he is entitled.’ ” (P. 383.)

In the light of these decisions petitioner was entitled to assert her legal title by use of the remedy of exceptions to the executor's inventory, in full confidence that if she were defeated in that claim, “either because the facts turned out to be different from what the plaintiff supposed them to be or the law applicable to the facts is found to be other than supposed” that she might then proceed to enforce her equitable rights wholly unembarrassed by the result in the first proceeding.

The Court of Appeals herein recognized and applied this rule. It quoted with approval the following from *Harrill vs. Davis*, 168 Fed. 187 (1909):

“ ‘The fatuous choice of a fancied remedy that never existed, and the futile pursuit of it until the court adjudges that it never had existence, is no defense to an action to enforce an actual remedy inconsistent with that first invoked,’ ” (Syl. 8.)

and cited a number of other authorities, including *Becker vs. Walworth*, 45 O. S. 169 (1887), to the same effect.

The Supreme Court of Ohio wholly ignored the decisions just quoted and has now held retroactively as to

petitioner that she acted at her peril in first attempting to assert her legal rights by the remedy of exceptions, and then to assert her equitable rights by a suit in equity, and that having made the wrong choice of proceeding at law she is wholly barred from relief in equity. This change of the rules in the middle of the litigation, we submit, is a denial of due process under the Fourteenth Amendment.

We are not seeking this review of the decision below merely because it is erroneous, *Central Land Company vs. Laidley*, 159 U. S. 103 (1895), or because it is a reversal of previous decisions on a question of general law, *Patterson vs. Colorado, ex rel. Attorney General*, 205 U. S. 454 (1907), but because in the respects hereinbefore pointed out it changed the law of the state in a way which as to *petitioner*, enlarged *retroactively* the jurisdiction of the Probate Court and imposed on *petitioner retroactively* duties to proceed therein which were non-existent at the time when it is held she should have so proceeded, with the result that she is, as hereinbefore pointed out, deprived of any hearing on the merits of her claims because she did not perform such then non-existent duties.

3. The Raising of the Federal Question on Application for Rehearing Was Timely as the Constitutional Questions Did Not Arise Until the Decision of That Court.

It seems to us that the decision of this court in *Brinkerhoff-Faris Trust & Savings Company vs. Hill, Treasurer*, 281 U. S. 673 is decisive upon this point. We think, also, the opinion of this court and the dissenting

opinion by Mr. Justice Cardozo in *Herndon vs. Georgia*, 295 U. S. 441, establish that the constitutional questions were here properly raised by the application for rehearing. In this case, unlike the situation in the *Herndon case*, there was no intervening decision by the state Supreme Court placing petitioner upon notice that the prior rulings of the court were to be abandoned and reversed in this case.

In both lower courts it was held that the decision in petitioner's former proceedings were not *res judicata*. The Court of Appeals held that the former case, being one at law, and the present, in equity, the decision against petitioner's claim of legal title presented no bar to the assertion of her equitable rights. There was, therefore, no occasion for petitioner to raise or argue any question under the Federal Constitution, for there was none in the case until the Supreme Court rendered its decision retroactively enlarging the jurisdiction of the Probate Court and retroactively imposing upon petitioner new duties and burdens and thus deprived her of any right to a hearing on the merits of her equitable claims as hereinbefore set forth. As stated by Mr. Justice Cardozo in the dissenting opinion in *Herndon vs. Georgia*, 295 U. S. 441, pages 452 and 453, petitioner,

"* * * might wait until the law of the case had been rejected by the reviewing court before insisting that the effect would be an invasion of his constitutional immunities. If invasion should occur, a motion for rehearing diligently pressed thereafter would be seasonable notice. This is the doctrine of *Missouri vs. Gehner* and *Brinkerhoff-Faris Co. vs. Hill*. It is the doctrine that must prevail if the great securities of the Constitution are not to be lost in a web of procedural entanglements." (Pp. 452, 453.)

CONCLUSION

We respectfully submit that this case is one calling for the exercise by this court of its supervisory powers in order that the errors of the Supreme Court of Ohio herein pointed out may be cured and that petitioner's fundamental constitutional right, safeguarded by the Fourteenth Amendment, to a hearing on the merits of her claims may be protected and enforced.

Respectfully submitted,

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